

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Regional Director, Region 8

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August 30, 2022

Christine G. Abrams, on behalf of the Council of Chiefs
Tonawanda Seneca Nation
PO Box 795
7028 Meadville Road
Basom, NY 14013
tonseneca@aol.com

RE: The Western New York Science and Technology Advanced Manufacturing Park
(STAMP)

Dear Ms. Abrams:

For more than a decade, the New York State Department of Environmental Conservation (DEC) has worked diligently to consult and engage with the Tonawanda Seneca Nation and its representatives to understand the Nation's concerns and address possible adverse environmental impacts from the STAMP project including, but not limited to, impacts to historical and cultural resources important to the Nation. Commissioner Seggos asked that I provide this letter that highlights DEC's ongoing engagement with the Nation, as well as the environmental and cultural benefits of that engagement to-date as a follow up to your request during the most recent annual meeting in May. We remain committed to engagement with the Nation on projects such as STAMP, and we continue to ensure the Commissioner and his executive team are involved in these processes.

In 2011, the Genesee County Economic Development Center (GCEDC) proposed developing the STAMP project site close to the border of the Tonawanda Seneca Nation's federally recognized Reservation Territory (Territory). As lead agency, GCEDC commenced the project's environmental review under New York State Environmental Quality Review Act (SEQR).

Consistent with DEC's responsibilities under SEQR, State Environmental Conservation Law, the State Historic Preservation Act (SHPA), and DEC Commissioner Policy on Contact, Cooperation, and Consultation with Indian Nations (CP-42), DEC has met in person with the Nation's representatives at the Longhouse and offices at the Territory; participated in regular electronic monthly meetings with the Nation; held additional meetings, electronic and in-person, on topics of interest to the Nation; initiated and responded to numerous calls and emails with the Nation; shared documents related to STAMP for Nation awareness or at Nation request; and developed a Letter of Resolution (LOR) with the participation of Nation representatives. These efforts



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underscore our commitment to enhanced communication and coordination between the Nation, DEC, the New York State Office of Parks, Recreation, and Historic Preservation (OPRHP), and GCEDC and produced substantive changes to the STAMP project with the goal of mitigating potential adverse impacts to the Nation.

Ongoing Consultation Regarding Historic Preservation Law

DEC has consulted with the Nation on archaeological investigations and related topics throughout STAMP project development, as OPRHP's Cultural Resource Inventory System's (CRIS) record illustrates. DEC is committed to continuing consultation about archeology with the Nation in the future, if additional archeological investigation proceeds or if further archeological issues arise.

DEC participated in consultation with the Nation about various historic preservation law matters throughout the development of the July 2018 Programmatic Agreement (PA), prepared pursuant to Section 106 of the National Historic Preservation Act. In connection with the U.S. Army Corps of Engineers (USACE) jurisdiction over wetlands at the STAMP site, USACE, DEC, OPRHP, the Nation, and GCEDC worked together to draft the PA, an agreement that lays out how federal historic preservation law is implemented in an organized and mutually agreeable manner, indirectly addressing State historic preservation legal requirements, at STAMP parcels subject to federal wetlands jurisdiction. This implementation is intended to prevent or mitigate, as appropriate, adverse historic and cultural impacts to the Nation's Territory. The finalized PA includes requirements for archeological investigations and data collection at the STAMP site, the handling of human remains, and investigation of potential cultural impacts, among other critical issues.

A similar process guided the coordination of DEC and OPRHP implementation of SHPA, through the LOR, for projects at the STAMP site where DEC rather than USACE has jurisdiction. DEC and the Nation worked together to develop these provisions and format of the LOR while it was drafted. This work resulted in the March 2021 LOR, which lays out a process for detailed analyses of potential impacts to the Nation's Traditional Cultural Property (TCP, i.e., the Nation's Territory), as well as for enhanced communication with the Nation's leadership and citizens on proposed projects at STAMP (e.g., the wastewater treatment plant), which are subject to the DEC policy on environmental justice, Commissioner's Policy 29 (CP-29).

Over the course of meetings and calls among the Nation, USACE, GCEDC, OPRHP, and other agencies as appropriate, DEC and the Nation discussed how the TCP study should be prepared. Both the PA and the LOR envision use of a TCP study prepared by the Nation to help implement federal and State historic preservation law. The TCP study is expected to provide the best information to evaluate potential adverse cultural impacts to the Territory.

DEC continues to look forward to receiving a completed TCP study from the Nation as early as practicable. Until that time, DEC will continue to implement the LOR to the best of our ability. DEC remains open to possible improvements to the LOR process and will schedule a meeting with the Nation on this topic if advised the Nation would like to pursue it. During the August 16, 2022, consultation meeting regarding GCEDC's Initial Assessments (IAs) for the powerline reroute and substation, the Nation expressed concern regarding the lack of Nation perspectives in the IAs produced by GCEDC, particularly how the IAs are to analyze potential impacts to cultural resources valued by the Tonawanda Seneca. DEC communicated these concerns to GCEDC during a meeting on August 18, 2022. When the Nation is prepared, DEC would like to further discuss how GCEDC may potentially improve its IAs for future projects. During the consultation, DEC acknowledged outstanding correspondence from the Nation and DEC's responses to these communications are attached hereto.

Addressing Concerns about Effluent Discharge from STAMP Wastewater Treatment

During consultation meetings with the Nation in 2011 and 2012, DEC became aware of Nation concerns regarding GCEDC's proposal to discharge treated wastewater from STAMP, in accordance with the required State Pollutant Discharge Elimination System (SPDES) permit to Whitney Creek in the southwest portion of the STAMP site. The proposed discharge location was approximately 500 to 1,000 feet east and upstream of the boundary between STAMP and the Nation's Territory.

After learning of the Nation's concerns, DEC raised questions about the planned wastewater treatment in comments on the SEQR Generic Environmental Impact Statement (GEIS) in a letter dated June 23, 2011. The Nation was copied on this transmittal. In DEC's February 7, 2012, comments on the final GEIS, the agency concluded there was "insufficient information contained in the Draft and Final GEISs to evaluate the impact of a new, on-site wastewater treatment plant," discharging to Whitney Creek, and that DEC would be unable to issue a SEQR Finding - a prerequisite for DEC approval of such a discharge. The Nation was copied on this correspondence.

Following DEC's comments on the Final GEIS comments, DEC met with GCEDC to express concerns about the plan for on-site discharge of treated wastewater to Whitney Creek and to discuss alternatives. As a result, in 2013 GCEDC evaluated alternatives for wastewater disposal. In response to DEC's March 21, 2014 request for additional information, GCEDC submitted a December 2014 report indicating there would be no on-site discharge of treated wastewater at STAMP. Since that time, GCEDC has not proposed on-site discharge of wastewater. Currently, GCEDC, via STAMP Sewer Works, Inc., the entity GCEDC formed for wastewater treatment, is seeking DEC

approval for permits to discharge treated wastewater approximately nine miles away at an outfall to Oak Orchard Creek in the town of Shelby, Orleans County.

Increasing the Boundary Buffer between the Nation's Territory and STAMP

At the May 22, 2012 consultation meeting, DEC, the Nation, and GCEDC discussed the Nation's concern regarding the boundary between the Nation's Territory and STAMP. During the meeting DEC voiced support for an updated survey and, if the project were to be developed, establishing an adequate buffer at that boundary. DEC's understanding, after that meeting, is that GCEDC surveyed the boundary and that Nation representative(s) were either present during the survey or provided the results of the survey, or both. Since that time, GCEDC has depicted a boundary buffer of 400 feet on STAMP site development plans. More recently, the buffer boundary increased from 400 to 500 feet in some locations per a settlement among GCEDC, the Nation, and STAMP's tenant, Plug Power.

Decreasing Phosphorus in Draft SPDES Permit for Proposed STAMP Wastewater Treatment System

In an October 22, 2021 letter, Chief Roger Hill conveyed the Nation's concern that the proposed STAMP wastewater treatment system discharge would enter Oak Orchard Creek in a segment listed on New York's Final 2018 Clean Water Act Section 303(d) List as an impaired waterbody for phosphorus. Subsequently, DEC further considered the potential impact of the discharge to phosphorus in the stream, and, in review of a biological assessment of Oak Orchard Creek, determined lowering the phosphorus limit from 0.5 mg/L to 0.2 mg/L, in addition to the on-site phosphorus mass load offsets, would lessen the in-stream phosphorus concentration, as well as offset the additional loading from the wastewater treatment facility such that the wastewater discharge would not cause or contribute to a water quality contravention for phosphorus.

DEC has verbally advised the Nation of this change to the draft SPDES permit. DEC also offered to meet with the Nation about the revised draft SPDES permit and the modified phosphorous limit. This meeting has not been scheduled. Please be advised that DEC will not be providing a copy of the revised draft SPDES permit as requested by the Nation during the August 16, 2022, consultation, as it is an internal agency draft document that is deliberative and privileged.

As outlined in this letter and attachments, DEC's ongoing relationship and interactions with the Nation on the development of the STAMP site have resulted in positive, substantive changes to the project that will benefit the environment. DEC remains committed to improving communication and ongoing consultation with the Nation throughout the remainder of the STAMP project.

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I appreciate your attention to this project and our ongoing work together to protect critical natural and cultural resources for future generations.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy P. Walsh". The signature is fluid and cursive, with a long horizontal stroke at the end.

Timothy P. Walsh, MPA, P.E.
Regional Director

ecc: Basil Seggos, Commissioner
Sean Mahar, Executive Deputy Commissioner
Erica Ringewald, Chief of Staff
Thomas Berkman, General Counsel
Adriana Espinoza, Deputy Commissioner
David Witt, Acting Director
Dudley Loew, Regional Attorney – Region 8

Please find below DEC's responses (in italics) to the following correspondences from the Nation:

- Letter dated June 24, 2022
- E-mail dated June 14, 2022
- E-mail dated July 12, 2022

In an email dated July 12th, 2022, Alex Page asked the following:

1. Dave mentioned during the meeting that he was taking notes. Please provide these meeting notes to the Nation.
A DEC staff member attending the consultation meeting with TSN on July 11, 2022, took notes for their own tracking purposes, on some items, and did not prepare complete notes to include all items discussed. These internal notes will not be provided to the Nation. However, as discussed during the August 16, 2022, consultation meeting about GCEDC's Initial Assessments for the powerline reroute and substation, DEC will take and circulate minutes of consultations to the Nation. Minutes for that meeting were provided to the Nation on August 24, 2022.
2. The Nation would like to request a second meeting to further discuss the pending Part 182 permit application. The Nation learned at yesterday's meeting that there is additional survey data from prior years (three years' worth of data, according to Ms. Lendrum) that the Nation has never seen but that DEC has considered in making jurisdictional determinations at STAMP relative to Part 182. As we await this survey data, the Nation will be reviewing the information provided at the meeting yesterday in preparation for a second discussion. Please provide dates in mid-August for a second meeting / follow-up discussion, assuming the survey data can be provided well in advance of that time.
DEC is satisfied with our consultation on the pending Part 182 permit application, which occurred on July 11, 2022. DEC, however, is amenable to answering any additional questions you may have regarding the pending Part 182 permit application. DEC will, of course, consult with the Nation if there are further Part 182 applications.
As indicated during the August 16, 2022 consultation regarding the Initial Assessments for the powerline reroute and substation, DEC has no additional survey data for the STAMP site for wintering raptors beyond the one year of survey data (i.e., 2021/22) which has already been provided to the Nation. There is additional survey data on wintering raptors which DEC has not received yet. DEC will send it to the Nation once it is received. There is also some breeding season survey data on the sedge wren that has been received, which can be provided upon request, and some additional survey data from breeding season surveys that has not yet been received; DEC will also send that data to Nation when it is received.
The 2021/2022 survey data resulted in much of the open field habitat on the STAMP site being mapped as occupied habitat for wintering northern harrier and short-eared owls. Impacts which convert these open field areas to any habitat other than open field would require Part 182 permits. For the areas that are mapped occupied habitat, three years of survey data showing that they do not

support the northern harrier and short-eared owls would be necessary before their occupied habitat status could be removed. This 3-year timeframe might be the cause of the misunderstanding about additional survey data in DEC's possession. As both species were documented in these areas just this past winter (for the first time for much of the site), there is no data at this juncture to support the removal of their "occupied habitat" designation.

Please note that bird surveying is an on-going activity which will continue even if this specific Part 182 permit is issued. As DEC receives additional survey data and reports, they will continue to be provided to the Nation.

3. The Nation looks forward to discussing the Power Line and Substation initial assessments with DEC. We are awaiting information responsive to our request for our May 16 request for additional information on the power line / substation / access road, a request we reiterated/clarified via email on July 7. We are reviewing the information provided by Luke Scannell on July 11 to determine whether it addresses part or all the missing information. Unfortunately, the dates proposed by DEC last Thursday (7/18-20) do not work for the Nation. We would appreciate your providing additional dates, keeping in mind that we do not yet know whether DEC has provided all the information necessary for the Nation's review of these projects.

We were glad to hear that you received all the documentation for this project as confirmed by Adam Walters during our joint call dated July 14, 2022. Thank you for consulting about the powerline reroute and substation on August 16, 2022. As indicated in DEC's e-mail dated August 24, 2022, DEC will consider comments from the Nation on the IA for the substation if they are provided by August 30, 2022.

4. The Nation and ESF would like to hold a call / virtual meeting with DEC to discuss ways we might work together on surveying and monitoring threatened and endangered species on and around the STAMP site. We hope that DEC staff with relevant expertise and responsibilities can be involved in such a call. Please provide potential dates, as well as names of DEC staff who may attend this meeting.

We agree that this collaborative effort is a good idea and we remain willing to meet on this. If you have dates in mind that would work for the Nation and the Center for Native Peoples and the Environment, please let us know. We understand it would be more appropriate for the Nation to make initial contact with the Center for Native Peoples and the Environment. Also, we understand that this will be an on-going general coordination beyond permit issuance decisions. Indian Nations Affairs Coordinator Beynan Ransom can be your DEC point of contact on moving this idea forward.

In an email dated June 14th, Alex Page asked the following.

5. Alex Page asked if changing the ID by substituting a new applicant name for STAMP Sewer Works would require that DEC issue a new NOCA, which would trigger a new public comment period, since 6 CRR-NY 621.7(b)(1) requires each NOCA to include "the applicant's name" and the public comment period runs only from a valid NOCA.

DEC addressed this comment in an e-mail to Alex Page on July 26, 2022.
Christine G. Abrams, on behalf of the Council of Chiefs for the Tonawanda Seneca Nation (TSN), sent a letter to Thomas Haley dated June 24, 2022 letter. Here is a summary of the comments and the Department's responses:

6. The letter states that consultation has not yet occurred.
DEC consulted with the Nation on the pending Part 182 permit application on July 11, 2022.
7. The letter states, "the NOCA incorrectly states that "the proposed action is not subject to CP-29."" And "The LOR states that "NYSDEC acknowledges that the Nation's Territory has been identified as a Potential Environmental Justice area and that, due to the STAMP Site's location adjacent to Nation Territory, [NYSDEC] will apply NYSDEC Commissioner Policy 29, Environmental Justice and Permitting ("CP-20") and CP-42, as provided herein, to all applicable elements of the Project undergoing environmental review and permitting."
CP-29 only applies to certain permit application types such as: Title V and Air State Facility, State Pollutant Discharge Elimination System (SPDES), solid waste management, and hazardous waste management. Part 182 is not included and, therefore, is not subject to CP-29.
To clarify, "applicable" as is it used above refers to the permit types specifically identified in CP-29. The LOR does not and was not meant to expand the scope of CP-29.
Please note that DEC did apply CP-29 to the SPDES permit application for the WWTP at the STAMP Site.
8. The Nation requests a public hearing.
We note your request for a public hearing and will consider it carefully. After a hearing decision has been made, we will inform the Nation.
9. The letter states that the Notice fails to identify the SEQR lead agency.
The Department previously responded to this comment in an e-mail to Alex Page dated July 26, 2022.
10. The Nation objects to GCEDC's intent to take Lead Agency Status.
GCEDC sent out a Lead Agency request in June of 2022, which DEC did not object to as GCEDC has been the Lead Agency on this project since 2011 and prepared the Generic Draft and Final EIS. GCEDC is also the project sponsor.
11. The letter states, "...the proposed mitigation is wholly inadequate as it fails to offer adequate habitat and does not comply with DEC's own standards for grassland bird habitat."
DEC will carefully consider this comment, along with any other comments submitted on the project including the letter from Christine Abrams dated July 21, 2022. These comments will be addressed in a Responsiveness Summary if a Part 182 permit is issued.
Please note that DEC has made changes to the draft Part 182 permit to clarify: the mitigation creation and monitoring, bird survey requirements, and ownership control over the mitigation parcel. Although DEC is satisfied with our consultation on the pending Part 182 permit application, which occurred on July 11, 2022, DEC is still willing to discuss these modifications with the Nation.